Michigan Law Review

Volume 58 | Issue 6

1960

Internal Affairs of Labor Unions Under the Labor Reform Act of 1959

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INTERNAL AFFAIRS OF LABOR UNIONS UNDER THE LABOR REFORM ACT OF 1959*

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THE Labor-Management Reporting and Disclosure Act of 1959[1] has two main divisions. One deals with the internal affairs of labor organizations and, incidentally, with certain dishonest practices in labor-management relations tending to corrupt union officials. The other deals with labor-management relations as such. This article is confined to the first branch.

I. LEGISLATIVE BACKGROUND

In the Report of the United States Commission on Industrial Relations of 1914, John R. Commons wrote:

> "It has doubtless appealed to some people who consider the employer's position more powerful than that of the union, that the employer should be compelled in some way to deal with unions, or at least to confer with their representatives. But if the State recognizes any particular union by requiring the employer to recognize it, the State must necessarily guarantee the union to the extent that it must strip it of any abuses it may practice."[2]

In retrospect it seems plain that the enactment of the LMRDA became inevitable when Congress, by enacting the Wagner Act,[3] not only granted employees the right to bargain collectively but also transported the political principle of majority rule into labor-management relations by giving the union designated by the majority the exclusive right to represent all the employees in an appropriate bargaining unit. The bargaining representative has power, in conjunction with the employer, to fix a worker's wages, hours and conditions of employment without his consent.[4] The employer and individual employee may not lawfully negotiate

* Portions of this article were first delivered as a lecture at the Institute of Industrial Relations, University of California at Los Angeles.

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1 Act of September 14, 1959, Public Law 86-257, 86th Cong., 1st sess.

2 U.S. COMMISSION ON INDUSTRIAL RELATIONS 374 (1915).

3 49 Stat. 449 (1935), as amended, 29 U.S.C. (1958) §§ 151-168.

4 See Steele v. Louisville & N.R. Co., 323 U.S. 192 at 202 (1944), in which Chief Justice Stone said on behalf of the Court, "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents. . . ."

terms or conditions of employment.[5] As a matter of practice and probably in legal theory, the union controls the grievance procedure through which contracts are enforced.[6] The government which confers this power upon labor organizations has a duty to insure that the power is not abused.

The pressure for the actual enactment of such legislation came from three sources. Since World War II there had been a growing concern lest some unions, which were plainly instruments of industrial democracy in representing the rights of employees against employers, become too indifferent to democracy and the rights of minorities within the organization. One finds evidence of this school of thought in academic publications[7] and the bills offered by the American Civil Liberties Union.[8] Two unions, the Upholsterers' International Union and the United Automobile Workers, reacted by creating impartial appeal boards to review disciplinary action by the international against individual members or a local union.

Second, the Select Committee on Improper Activities in the Labor or Management Field, popularly known as the McClellan Committee, began dramatizing related questions. The committee was principally concerned with the misuse of union funds by dishonest officers, with illicit profits, violence and racketeering and, in its later days, with secondary boycotts and organizational picketing but, although its own hearings were frequently marred by disrespect for the rights of the witnesses, the committee also uncovered shocking evidence of internal misgovernment within a small handful of labor organizations. The disclosures built up pressure for reform.

The third source of pressure was the National Association of Manufacturers, the United States Chamber of Commerce and other employer organizations whose primary object appears to have been to use the outcry against corruption within labor unions as an occasion for revising labor-management relations laws in a man-

[5] Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944). Cf J. I. Case Co. v. NLRB, 321 U.S. 332 (1944).

[6] For a recent decision indicating that the union has power to settle grievances, see Jenkins v. Wm. Schluderberg—T. J. Kurdle Co., (Md. 1958) 144 A. (2d) 88 (dictum). The point is discussed at length in Cox, "Rights Under a Labor Agreement," 69 HARV. L. REV. 601 (1956).

[7] E.g., Aaron and Komaroff, "Statutory Regulation of Internal Union Affairs," 44 ILL. L. REV. 425, 631 (1949); Summers, "Legal Limitations on Union Discipline," 64 HARV. L. REV. 1049 (1951).

[8] Hearings before the House Committee on Education and Labor on Bills to Amend and Repeal the NLRA, 80th Cong., 1st sess., 3633-3643 (1947).

ner which would weaken the unions. The business lobbyists sought incidentally to "toughen" any proposal to regulate the conduct of unions or their officials even though the measure pertained exclusively to relations between the unions and their own members.

The LMRDA provisions dealing with internal union affairs stem from bills introduced by Senator Kennedy during the 85th Congress. The first would have required labor organizations to file complete financial reports with the Secretary of Labor, which would be open to public inspection.[9] It also sought to bring to light by reporting all financial holdings or income of union officials which might create a conflict between their own selfish interests and unswerving loyalty to union members. The third principal division of this bill would have limited the power of international unions to suspend local autonomy by trusteeships or receiverships. The Kennedy bill went far beyond the administration's proposal and was strongly attacked by AFL-CIO President Meany in his testimony before the Senate Labor Committee. Later, the strong congressional support for the still more stringent measures introduced by Senator Knowland[10] convinced the most perceptive leaders of the labor movement that a reform bill was inevitable.

At this stage Senator Kennedy introduced a second bill,[11] which would require labor organizations to choose their officials in periodic elections either by secret ballot or by a convention of delegates chosen by secret ballot. The bill also laid down a few basic rules designed to secure every member an opportunity to vote without coercion or restraint. Enforcement was to be vested in the Secretary of Labor who was given power to conduct a new election if the first was proved illegal in a federal court.

The Senate Labor Committee combined these bills with various provisions espoused by Senator McClellan the chief effect of which was to bar criminals from union office and to make various offenses against unions into federal crimes.[12] The committee also recommended sweeping provisions requiring employers to report expenditures for labor relations and recommended minor changes in the Taft-Hartley Act desired by the labor movement. The latter changes were described as non-controversial because they were not only supported by Senator Kennedy and the northern Demo-

[9] S. 3454, 85th Cong., 2d sess. (1958).
[10] S. 3068, 85th Cong., 2d sess. (1958).
[11] S. 3751, 85th Cong., 2d sess. (1958).
[12] S. 3974, 85th Cong., 2d sess. (1958); S. Rep. 1684, 85th Cong., 2d sess. (1958)

crats but also had been recommended by the President and Secretary of Labor and approved by the Senate Labor Committee under Republican majorities. Senator Ives played a leading role in developing this measure and securing Republican support.

The Kennedy-Ives bill was amended on the Senate floor in some details but it passed the Senate by a vote of 88 to 1 without substantial change.[13] The bill was killed in the House partly as a result of the combined opposition of business groups and labor unions.[14]

At the start of the 86th Congress, Senator Kennedy introduced the Kennedy-Ervin bill, a refurbished version of the Kennedy-Ives measure.[15] The provisions requiring financial reports by employers were substantially narrower than the corresponding sections of the Kennedy-Ives bill and some of the proposed amendments to the Taft-Hartley Act were narrowed or omitted. The changes made by the Labor Committee had the effect of making the regulations more detailed, especially in the title dealing with elections, but they did not affect the theory or basic subject matter of the measure.[16] The major issues during the floor debate involved Taft-Hartley amendments which do not concern us here except for the introduction of a so-called "Bill of Rights" which ultimately became Title I of the LMRDA.[17]

Sentiment in the House of Representatives coalesced about three proposals. The first was a mild reform bill sponsored by Representative Shelley of California and supported by the labor movement and its most ardent sympathizers.[18] In the middle of the road stood the Elliott bill.[19] The Elliott bill was based upon the bill passed by the Senate but it contained a number of important modifications in the "Bill of Rights" and corrected some of the details of the Senate version. Its most important contribution, as events proved, was the introduction of a new section declaring the fiduciary duties of union officials and providing a federal remedy. At the extreme right was the Landrum-Griffin bill which combined the Senate version of the "Bill of Rights" and the Elliott proposals on reporting and disclosure, elections, trusteeships and the fiduciary duties of union officials but which substi-

[13] 104 CONG. REC. 11487 (1958).
[14] 104 CONG. REC. 18260 (1958).
[15] S. 505, 86th Cong., 1st sess. (1959).
[16] S. 1555, 86th Cong., 1st sess. (1959).
[17] 105 CONG. REC. 5810-5811 (April 22, 1959); 105 CONG. REC. 6005-6030 (April 25, 1959).
[18] H.R. 8490, 86th Cong., 1st sess. (1959).
[19] H.R. 8342, 86th Cong., 1st sess. (1959).

tuted for the pro-labor Taft-Hartley amendments new restrictions upon secondary boycotts and organizational picketing.[20] The Landrum-Griffin bill also proposed to give the NLRB power to cede large portions of its jurisdiction to state courts and agencies governed by state law. Ultimately the House adopted the Landrum-Griffin proposal[21] and a Conference Committee was appointed.

Although there were sharp differences between the House and Senate conferees upon some details of the proposed regulation of internal union affairs, the major controversy revolved about issues of labor-management relations law. After two weeks there was agreement upon a Conference Report. The report was adopted in both Houses by overwhelming votes[22] and became the Labor-Management Reporting and Disclosure Act of 1959.

Thus, the final regulation of internal union affairs came from several sources. The "Bill of Rights" is a modified version of Senator McClellan's proposal. The provisions subjecting union officials to fiduciary duties came from the Elliott bill. The core of the reporting requirements, the restrictions upon improper trusteeships and receiverships, and the electoral guarantees as well as the tightening of the criminal law were derived from the bills sponsored by Senator Kennedy.

II. THE FINANCIAL OBLIGATIONS OF UNION OFFICIALS

In equity the large sums of money gathered into the treasuries of labor organizations belong to the members. The members are entitled to share in the management and expenditure of their funds, and to have a periodic accounting. The officers are fiduciaries charged with handling the funds for the benefit, and in accordance with the instructions, of the members. The McClellan Committee hearings demonstrated that important union officials were stealing from the members, chiefly in the International Union of Operating Engineers, the International Brotherhood of Teamsters and the United Textile Workers. There could be no dispute about the desirability of stamping out the thievery and raising obstacles to its repetition. The only problem was to devise the most effective methods. The LMRDA pursues three courses of action.

[20] H.R. 8400, 86th Cong., 1st sess. (1959).
[21] 105 CONG. REC. 14540-14541 (Aug. 14, 1959).
[22] 105 CONG. REC. 16435 (Sept. 3, 1959); 105 CONG. REC. 16653-16654 (Sept. 4, 1959).

A. NEW CRIMINAL OFFENSES

The act creates several new federal crimes involving financial dishonesty on the part of union officials. Embezzlement of the funds of a labor organization engaged in an industry affecting commerce becomes a felony;[23] the willful destruction or falsification of its records is punishable as a misdemeanor.[24] Since the hearings uncovered large "loans" from union treasuries to union officials, which had not been repaid, the act forbids lending an officer or member more than $2,000.[25] The prohibition may cause some inconvenience to international representatives transferred to new locations, for some unions previously lent them the capital necessary to resettle their families at a low rate of interest, but the blanket prohibition seems to be the only way to eliminate the use of loans to conceal embezzlement or to aid a dominant officer who wants capital for private speculation. In an effort to drive criminals from the labor movement it was also made an offense to occupy a responsible union position or knowingly to permit one to occupy such a position within five years after conviction of specified crimes.[26]

B. REPORTING AND DISCLOSURE

The LMRDA also requires every labor organization in an industry affecting interstate commerce to file an annual financial report disclosing its receipts and disbursements together with the sources and purposes thereof.[27] The reports are filed with the Secretary of Labor on forms prescribed by him. They are open to union members, the press and the general public. A union is required to preserve the records necessary to verify and substantiate its reports.[28] The Secretary of Labor is authorized to investigate the accuracy of reports armed with the power to subpoena.[29] Failure to file a report or filing an intentionally false report is punishable by fine or imprisonment.[30] The Secretary is also given the rather unusual power to "report to interested persons or officials concern-

23 Section 501 (c).
24 Section 209 (c).
25 Section 503 (a).
26 Section 504.
27 Section 201.
28 Sections 205-206, 209 (c).
29 Section 601.
30 Section 209.

ing the facts required to be shown in any report required by this Act and concerning the reasons for failure or refusal to file such a report or any other matter which he deems to be appropriate as a result of such an investigation."[31]

This provision seeks to implement the basic theory of the statute — that the government should assure union members adequate information about the conduct of the union's financial affairs; that it should guarantee fair elections for the selection of officers; and that it should then trust the good sense of the members to remove any incompetent or dishonest officials. The Secretary's function is to furnish the members with the facts which should have been supplied by union officials. In legal usage "interested persons" means not the curious, but those who are substantially affected. Possibly the section permits an irresponsible Secretary to injure a union which displeases him by issuing hostile press releases without a hearing, but this is a power possessed by all prosecutors or investigators without express statutory authorization.[32] The risk is a small price to pay for the safeguard.

It remains to be seen whether the theory of reporting and disclosure will discourage the repetition of past scandals and eliminate honest but careless financial practices. Similar sanctions have proved sufficiently effective in other contexts to justify their use before resorting to harsher methods.

The preparation of reports will multiply paper work. The statute also requires each officer to obtain an individual bond.[33] It raises vague dangers of personal liability in the minds of men

31 Section 601 (a).

32 Glass v. Ickes, (D.C. Cir. 1940) 117 F. (2d) 273.

33 Section 502. The interpretative bulletin issued by the Secretary of Labor rules that the bonding requirement is satisfied by a position schedule bond, i.e., one which covers any officials and union agents holding specified positions without naming the particular individuals. 29 C.F.R. §453.18 (Supp. 1960). This interpretation may well be a proper reading of statutory language. It appears to be buttressed by usage in the insurance field. It is quite plain, however, that many of the House and Senate conferees believed that §502 did not permit position schedule bonds but required either individual bonds or name schedule bonds. Senators Kennedy, Morse, McNamara and Randolph strenuously objected to this requirement. The conference accepted it by a majority vote only after protracted argument when it became apparent that the House view would have to be accepted if the conferees were to agree upon a report. Senator Morse opposed the conference report upon this ground among others. See 105 CONG. REC. 16388 (Sept. 3, 1959).

In the same regulation the Secretary of Labor construes §502 to require that union officials be bonded only for the proper handling of union funds. Although the bonding companies have suggested that §502 may be somewhat broader in scope, it seems quite plain that this interpretation not only conforms to the language of the statute but also carries out the intention of all the members of the conference committees.

to whom legal proceedings are unfamiliar. Local union offices carry no pay and little honor. Thus the statute may make it harder to fill the necessary offices. Compliance with the bonding and reporting requirements will entail considerable expense. The easiest way for the international unions to meet these problems is to merge a number of locals into a single unit, a trend which was evident before the LMRDA was enacted. Since there was no evidence of past misconduct and little temptation to dishonesty in such cases, the Senate sought to minimize the problem by creating a revocable exemption for truly small unions,[34] but the coalition of Republicans and Southern Democrats insisted upon deleting the exemption in order to "toughen" the bill. Fortunately, the Secretary of Labor is authorized to provide a simplified form of report for small locals and his initial regulations appear well suited to minimizing the burden.[35]

More disturbing than the outright thievery revealed by the McClellan Committee was the evidence of the use of union office for personal profit; for one suspects that the vice of playing both sides of the street, under-cover deals, and conflicts of interest infect a good many unions whose officials believe themselves to be personally honest. Two illustrations reported by the committee deserve mention. About 1950, according to the report, Peter W. Weber, business manager of Local 825 of the International Union of Operating Engineers, secured a twelve percent interest in Public Constructors, Inc., in exchange for a loan of $2,500. Public Constructors did business within the territorial jurisdiction of Local 825 and had collective bargaining agreements with that union. In negotiating and administering these contracts Weber's personal financial interests stood in direct conflict with unselfish devotion to the welfare of the employees. By 1959 the book value of his business interest had increased almost fifty-fold its cost — to $108,677.[36] Other evidence before the committee tended to show that James Hoffa held interests in firms with which the International Brotherhood of Teamsters bargained.[37]

Such conduct, if it occurred as reported, offends ancient moral precepts. The common law has condemned it for generations. AFL-CIO Ethical Practices Code IV states:

[34] S. 1555, 86th Cong., 1st sess., §201 (d) (1959), as passed by Senate.

[35] Section 208. 24 Fed. Reg. 9931, 10105 (1959). The regulation will appear at 29 C.F.R. §§403.1 to 403.10.

[36] S. Hearings Before the Select Committee on Improper Activities in the Labor or Management Field, 85th Cong., 2d sess., pt. 20, 8134-8140 (1958).

[37] Id., 85th Cong., 1st sess., pt. 13, 5038 (1957).

". . . a basic ethical principle in the conduct of trade union affairs is that no responsible trade union official should have a personal financial interest which conflicts with the full performance of his fiduciary duties as a workers' representative."

The code then condemns a number of specific practices illustrating the basic principle — loans by a union to an officer, owning an interest in a business with which the union bargains or an enterprise which is in competition with such a business, and owning an interest in an enterprise a substantial part of which consists of buying from, selling to, or otherwise dealing with a business with which the union bargains.

Unfortunately the AFL-CIO lacks power to implement the code except by expelling an entire international union. It has no method of gathering evidence. It cannot proceed against individuals. In many cases the sanction of expulsion would be too severe; in others too harmful to the labor movement.

The original Kennedy bills sought to support the underlying moral precepts by requiring every union officer annually to report to the Secretary of Labor any holdings, income or transactions which created a potential conflict between his personal interests and loyalty to the members.[38] These sections, which reach not only cases where the official has legal title, but also beneficial ownership held through "covers," "straws" or "blinds," were carried into the LMRDA without amendment.[39] True criminals will undoubtedly ignore the duty to report but the detailed and unequivocal legislative condemnation of specific holdings and transactions should go far toward establishing a higher standard of conduct. The official whose fingers itch for a "fast buck" but who is not a criminal will be deterred by the fear of prosecution if he files no report and by fear of reprisal from the members if he does.

C. FIDUCIARY OBLIGATIONS

Despite the scarcity of direct precedent, it seems plain that all union officers and employees have always been subject to the usual common-law fiduciary duties of an agent.[40] Violations are redressible in the state courts. The duty is so seldom enforced,

[38] S. 3454, 85th Cong., 2d sess., §102 (1958).

[39] Section 202.

[40] Union officers are obviously agents. All true agents owe fiduciary obligations to their principals. AGENCY RESTATEMENT SECOND §§387-398 (1958). Curiously, there appear to be only two judicial opinions which set forth the rule. Dusing v. Nuzzo, 26 N.Y.S. (2d) 345 (1941); Tinkler v. Powell, 23 Wyo. 352, 151 P. 1097 (1915).

however, that the House Labor Committee adopted, and the Senate approved, an amendment giving it a federal statutory base. Section 501 (a) states in general terms the union agent's obligation to act solely for the benefit of his principal, to be loyal, to refrain from competing with his principal or acquiring conflicting interests and "to account . . . for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction." The principles stated in section 501 (a) were drawn from the *Restatement of Agency* in an effort to incorporate the whole body of common law precedents defining the fiduciary obligations of agents and trustees[41] with such adaptations as might be required to take into account "the special problems and functions of a labor organization. . . ."[42]

Section 501 (b) authorizes any union member to bring a suit in the federal court in the nature of a minority stockholder's bill whenever his union refuses to sue an officer or employee alleged to be guilty of a breach of fiduciary obligations. The trial judge may allot part of any sums recovered for counsel fees and expenses. All the usual remedies for breach of trust are available.[43]

These provisions are potentially among the most important in the LMRDA. If individual members have the initiative and interest to bring suit, the Becks, Hoffas and Webers may be required to account not only for alleged misappropriations but also for all the profits which they may have made by virtue of their offices. If the findings of the McClellan Committee were sustained in court, equity would impose a trust for the benefit of the Operating Engineers upon Weber's stock in Public Constructors; Beck would be required to account for the moneys or gifts allegedly received from Nathan Shefferman; and, if Hoffa received loans from the Teamsters, he might well be required to account not only for the money but also for any proceeds of his investment.

Section 501 imposes no restrictions upon the purposes for which a labor organization may expend its funds. The propriety of union activities other than collective bargaining, such as charitable contributions and support for political candidates, may be fairly debatable but this is a separate issue of too great importance for the courts to resolve by interpreting a provision which deals directly with only the duties of union agents to the

41 See AGENCY RESTATEMENT SECOND §§387, 388, 389 and 394 (1958).

42 Section 501 (a).

43 Section 501 (b) provides that the action may be brought to "recover damages or secure an accounting or other appropriate relief."

organization and its members. Read in their context the words are plain; it is made the duty of the union officers and agents "to manage, invest, and expend . . . [the union's money and property] in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder." An agent who follows the instructions of his principal is not guilty of a breach of fiduciary duties. Section 501 emphasizes the importance of giving careful attention to the constitutional provisions and resolutions of governing bodies but where the union grants the necessary authority, no statutory restriction is imposed. If there were ambiguity it would be dispelled by the statement of five members of the House Labor Committee in reporting the committee bill, for they were the five who sponsored the bill and they included Congressman O'Hara, who proposed section 501 in the Labor Committee.[44] Senator Kennedy gave a similar explanation in presenting the Conference Report.[45]

III. INTERNAL UNION DEMOCRACY

In a rudimentary modern political sense democracy implies (a) control of governing decisions by those affected and (b) a decent respect for the fundamental rights of individuals and minorities, not only by the individuals in power but also by the ruling majority. No politician dares publicly to question the value of democracy in the government of labor organizations but among academicians there is quiet and serious debate. According to one view, labor unions should be regarded as military organizations, for their function is to wage economic warfare with employers who are constantly feeling out chinks in the unions' defenses through which to wound, if not destroy, them. As a wartime army can neither brook divided leadership nor tolerate active dissidents so must a union punish the trouble-makers in order to close ranks against employers and rival organizations. The sophisticated exponents of this view also contend that since union officials have better training and more experience than rank and file members, those officials who are given the power will act more responsibly in enforcing the union's obligations to employers, will present fewer preposterous or impractical demands and, if allowed the power, will enforce their decisions. Professor John T. Dunlop warns us:

[44] H. Rep. 741, 86th Cong., 1st sess., 81-82 (1959).
[45] 105 CONG. REC. 16540 (Sept. 3, 1959).

> "Already we are seeing employers who urged Congress to pass 'strong legislation' affecting internal union government going to national union officers as of old seeking national union support to restrain the demands of locals and to make agreements. They are not likely to get as much cooperation; they could not be given as much. The country has chosen on the grounds of morality and democracy to make wage stability more difficult to achieve."

The advocates of this position hope to improve union government by creating a sense of professional responsibility among union officials. Perhaps the partial professionalization of management is an encouraging precedent.

But the argument is hardly persuasive. An autocratic union may serve the material demands of its members by bargaining effectively for higher wages and increased benefits. It may establish a measure of job security. None except a democratic union, however, can achieve the idealistic aspirations which justify labor organizations. Collective bargaining may limit the employer's power by substituting a negotiated agreement for arbitrary tyranny of the boss, but it scarcely extends the rule of law to substitute an autocratic union. Only in a democratic union can workers, through chosen representatives, participate jointly with management in the government of their industrial lives even as all of us may participate, through elected representatives, in political government.

The state alone cannot achieve true union democracy but it has much to contribute. Preserving democracy requires protecting individuals and minorities against numerical majorities or an officialdom which acts with the majority's consent. It is not enough to put our trust in self-restraint. The task of assuring workers the ultimate control of the affairs of their unions should be undertaken by law because it is the law which gives a union, as bargaining representative, the quasi-legislative power to bind employees in the bargaining unit without their consent.

Half a century ago unions were too fragile to survive internal dissension, but surely no one seriously doubts the current ability of the major labor organizations to survive free elections, free debate and a decent respect for minorities among the members. To show that union officials have a better grasp of economic policy than the rank and file and a higher sense of obligation does not demonstrate the wisdom of aristocratic government in labor relations for the same reasons that the parallel argument fails in

relation to the government of nations. Leadership is required, but it should be achieved by the arts of the statesman and not the easy road of compulsion with its denials of opportunity and temptations to tyranny and sloth. The proper balance between control by the membership and the executive direction necessary to effective action cannot be achieved by general debate about the desirability of democracy; it involves specific questions concerning the disposition of power and the frequency of elections.[46]

A. *The Bill of Rights for Union Members*

Although the bill sponsored by the Senate Committee on Labor and Public Welfare protected many of the interests of union members, its provisions concentrated upon specific areas in which abuses had occurred and for which existing remedies appeared inadequate — the handling of funds, conflicts of interest, union elections, international trusteeships and racketeering. Senator Kennedy and his advisers were acutely aware of what they deemed the risks of destroying self-government within the labor unions.

> "Trade unions have made a commendable effort to correct internal abuses; hence the committee believes that only essential standards should be imposed by legislation. Moreover, in establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken unions in their role as collective-bargaining agents."[47]

There were others who did not share this concern. On the Senate floor Senator McClellan, who had introduced bills to establish a system of union registration and prescribe the terms of union constitutions and by-laws, sponsored an amendment to create a "bill of rights" for union members.[48] The amendment contained sweeping guarantees in absolute terms of freedom of speech and assembly, and of "equal rights and privileges" in voting, participation at meetings and the handling of grievances. There were tight restrictions upon increases in union dues. The expulsion of a member was prohibited unless there was a verbatim stenographic transcript of the trial and review by an outsider. Members' rights were made enforceable by a suit for an injunction. Willful violations were made felonies.

[46] See pp. 842-845 infra.
[47] S. Rep. 187, 86th Cong., 1st sess., 7 (1959).
[48] 105 CONG. REC. 5810-5811 (April 22, 1959).

The sponsors of the amendment may have counted upon cautious judicial interpretation to qualify its vague and sweeping absolutes much as the constitutional Bill of Rights is tempered by judicial decisions; and possibly they were right. The critics doubted whether even the Supreme Court would interpret statutory restrictions upon a labor union in the same fashion as constitutional limitations upon the Congress. They feared that inferior courts, many of the judges being extremely hostile to unions, would give the sweeping phrases their fullest, literal meaning. In any event, it seemed extremely unfair to ask a union official to accept such risks as presiding over a meeting under threat of conviction for a felony if one of his rulings was later held to deny a member freedom of speech.

Other provisions seemed impractical, especially the guaranty of "equal rights and privileges" in every phase of union activity. Workers are constantly complaining that management and union officials have mishandled their grievances and some form of safeguard is desirable.[49] The McClellan bill of rights seemed to provide that such complaints should be investigated by the Secretary of Labor whenever it was alleged that the union failed to grant "equal rights and privileges," thus transferring the grievance from the shop floor to governmental channels. Again, fairness sometimes requires differentiations within the ranks of union members. Many local unions have a mixed membership. A local of the International Brotherhood of Electrical Workers, for example, may include construction workers and also members from a power company or a manufacturing concern. If the business on the agenda were whether to go on strike or ratify a proposed contract covering electrical construction, it would seem reasonable to bar the industrial members from the vote. If a local industrial union had members from four non-competitive factories whose employees composed four bargaining units, it might be reasonable to provide in the by-laws that only the members employed at a particular company should vote upon items of business confined to that bargaining unit. To outlaw such by-laws seemed unnecessarily to curtail the opportunities of self-determination.

The Senate adopted the McClellan amendment by a vote of 47 to 46,[50] but strong sentiment for modification immediately sprang

[49] For comprehensive discussions of this problem, see Report of the Committee on Improvement of the Administration of Union-Employer Contracts, ABA, SECTION OF LABOR RELATIONS LAW PROC. 33 (1954); Cox, "Rights Under a Labor Agreement," 69 HARV. L. REV. 601 (1956).

[50] 105 CONG. REC. 5827 (April 22, 1959).

up not only among its opponents but also in the ranks of Southern supporters who came to realize that the authorization of governmental suits for injunctions to enforce private rights would be an embarrassing precedent in future debates over civil rights legislation. During the next two days a compromise was drafted. Many groups had to be consulted and since the Senate had proceeded to other sections of the bill the work was done late at night or in little knots upon the Senate floor. The draftsmanship left much to be desired, perhaps because of the haste and stress, the number of participants, and the priority of tactical acceptability over nicety of expression. The Senate approved the compromise by an overwhelming vote.[51]

Legislative tactics also triumphed over sound draftsmanship in the House of Representatives. The draftsman of the Landrum-Griffin bill incorporated the bill of rights passed by the Senate because its sponsors had instructed him not to write any original provisions. The Landrum-Griffin bill was approved upon the House floor without prior consideration in committee. Since there were no differences between the Senate and House bills in this respect, under parliamentary law the conferees were powerless to revise the bill of rights. Thus, these sections never received the careful technical review and clarification which comes from scrutiny by a congressional committee and its legislative staff.

Participation in Union Affairs. Section 101 (a) (1) of the LMRDA guarantees all union members "equal rights and privileges" in nominating candidates and voting in union elections, in attending union meetings, and in discussing and voting upon union affairs, all "subject to reasonable rules and regulations in such organization's constitution and bylaws." The qualification is the result of the accommodation between the practicalities of union government and the commendable aim of preventing unjust discrimination between union members. Time and litigation will be required to determine what are "reasonable rules and regulations," but the basic distinction is not hard to illustrate. The division of members into voting and non-voting classes exemplified by the prior practice of the Operating Engineers is contrary to section 101 (a). On the other hand, in local unions with a mixed membership it would be reasonable, as shown above, to limit the voting upon specific issues to those who are directly concerned.

[51] 105 CONG. REC. 6030 (April 25, 1959).

Discrimination against apprentices is probably unreasonable, although the distinction has the possible justification that they are usually less mature than journeymen members while they are learning the trade. The Culinary Workers, Barbers, and other unions which admit employers to membership will probably have to choose, when subject to the act, between granting employers the right to participate in meetings, which has heretofore been denied, and surrendering this method of subjecting employers to the union's rules. The principle underlying section 101 (a) (1) is that those who are bound, as members, by the union's decisions should have the opportunity to take part in the deliberations. All members are plainly entitled to vote in union elections for the statutory right of each member to cast one vote cannot be qualified by even a reasonable rule.[52]

Some unions allow retired employees and workers who have left the trade or industry to retain their cards as non-voting members. Surely this is reasonable in substance, but the technical doubt could be minimized by constitutional amendments establishing a special category of members emeriti who, like retired professors, would retain the dignity and social status of members but lose their rights and duties.

Section 101 (a) (1) may also help to check the use of violence to suppress dissent, which every student of union government knows to occur even though he cannot document the assertion. To evict a dissident from a meeting would violate section 101 (a) (1) unless he violated normal rules of decorum. Interference with a critic's right to speak, offer motions and vote would also be unlawful.

Freedom of Speech and Assembly. Section 101 (a) (2) carries the legal protection of dissent a step farther by guaranteeing union members freedom of speech both inside and outside union meetings, and also by securing the critics an opportunity to meet for the purpose of organizing their opposition. The latter privilege would seem essential to the formation of effective minorities even though it flies in the face of traditional trade union opposition to any form of caucus or separate assemblage. However, dissent in a union, like treason within a nation, must be suppressed if the purpose is to

[52] Section 401 (e). The Secretary of Labor has ruled that the proviso to §101 (a) (1) qualifies §401 (e) apparently upon the theory that this interpretation is necessary to avoid inconsistency. But the specific provision is §401 (e) which deals with voting in elections, and under the normal rules of statutory interpretation the specific provision should control. The Secretary has also ruled, contrary to the text above, that apprentices may be denied the right to vote. 29 C.F.R. §452.10 (Supp. 1960). Since the Secretary is in charge of all proceedings to enforce the elections requirements these interpretations will control.

destroy the union, encourage a rival, or bring about the violation of legal or contractual obligations. Section 101 (a) (2) contains an exception for these cases.

Dues and Assessments. Section 101 (a) (3) prohibits a local union from increasing its dues or assessments except by a secret vote of the members in a referendum or a meeting called for the purpose. An international union may make an increase at a convention or by a referendum of the members and, for the period before the next convention, by vote of the executive board or similar governing body. The only serious question raised by this provision concerns the manner of raising the payments due the international union in situations where the member pays all his dues to the local union and the local pays a per capita tax to the international. Since there is no evidence of an intention to affect the ability of unions to raise money or to regulate the allocation of power between local and international unions, section 101 (a) (3) should be read as a specification of the forms through which each body should express its will when the union constitution requires its action, without affecting other aspects of the process. An international could therefore raise the per capita tax by any of the statutory methods without the assent of the local union, but the local would decide whether to increase the share of the dues paid to the international or actually raise the dues.

Disciplinary Procedure. Although the rules were originally formulated in cases involving religious organizations, social clubs, and somewhat later, fraternal benefit associations, the courts evolved satisfactory rules applicable to the expulsion of union members long prior to enactment of the LMRDA. Upon the theory that improper expulsion violates the member's interest in the organization's property or a contract between him and other members made up of the constitution and by-laws or, in recent years, upon the ground that there is a tortious interference with an advantageous relationship, the state will set an expulsion aside upon any of five grounds:

(1) The procedure violated the union's constitution or by-laws.[53]

[53] Harris v. National Union of Marine Cooks, 98 Cal. App. (2d) 733, 221 P. (2d) 136 (1950); Walsh v. Reardon, 274 Mass. 530, 174 N.E. 912 (1931); Howland v. Local 306, UAW-CIO, 323 Mich. 305, 35 N.W. (2d) 166 (1948); Savard v. Industrial Trades Union of America, 76 R.I. 496, 72 A. (2d) 660 (1950).

(2) The constitution or by-laws did not authorize expulsion for the alleged offense.[54]

(3) The procedure, although it conformed to the union's constitution and by-laws, did not afford the member a fair hearing.[55]

(4) The expulsion, although it was authorized by the union's constitution and by-laws, was "unreasonable," contrary to "public policy," or contrary to "natural justice."[56]

(5) The expulsion was in bad faith because the purported ground was only a pretense for getting rid of a troublesome member.[57]

The rule invalidating expulsion without a hearing requires observance of much the same minimum safeguards as the due process clause of the Fifth and Fourteenth Amendments has been held to impose upon the adjudicative procedures of the state and federal governments. The accused member must be given an opportunity to hear the charge,[58] to present evidence in his defense,[59] and to confront and probably to cross-examine the witnesses against him.[60] Any special trial body may not include his accusers,[61] but presumably a trial may be held before the full membership. It seems unlikely that the accused member is entitled to the aid of a lawyer in his defense. The accused is entitled to be put upon a roughly equal footing with the prosecutors. If they are laymen, surely he is entitled to no more professional assistance. Although

54 Otto v. Journeymen Tailors' Union, 75 Cal. 308, 17 P. 217 (1888).

55 Gilmore v. Palmer, 109 Misc. 552, 179 N.Y.S. 1 (1919). *Contra,* State ex rel. Dame v. Le Fevre, 251 Wis. 146, 28 N.W. (2d) 349 (1947).

56 See Swaine v. Miller, 72 Mo. App. 444 at 446 (1897); Spayd v. Ringing Rock Lodge No. 665, Brotherhood of R.R. Trainmen, 270 Pa. 67, 113 A. 70 (1921); Chafee, "The Internal Affairs of Associations Not for Profit," 43 HARV. L. REV. 993 at 1015-1018 (1930). Cf. Dawkins v. Antrobus, [1881] 44 L.T.R. (n.s.) 557 at 559-560 (dictum).

57 Otto v. Journeymen Tailors' Union, 75 Cal. 308, 17 P. 217 (1888); Fleming v. Moving Picture Mach. Operators, 16 N.J. Misc. 502, 1 A. (2d) 850 (1938), affd. 124 N.J. Eq. 269, 1 A. (2d) 386 (1938); Kuzych v. White, [1950] 4 D.L.R. 187. Cf. Eschman v. Huebner, 226 Ill. App. 537 (1922).

58 Armant v. Cannon Employees, (Cal. Super. 1942) 11 L.R.R.M. 752 (member not informed of evidence against him); Walsh v. International Alliance of Theatrical Stage Employees, 22 N.J. Misc. 161, 37 A. (2d) 667 (1944) (charge too vague); Bartone v. Di Pietro, 18 N.Y.S. (2d) 178 (1939) (no notice of nature of charge).

59 Cotton Jammers' and Longshoremen's Assn. v. Taylor, 23 Tex. Civ. App. 367, 56 S.W. 553 (1900) (alternative holding).

60 Armant v. Cannon Employees, (Cal. Super. 1942) 11 L.R.R.M. 752; Brooks v. Engar, 259 App. Div. 333, 19 N.Y.S. (2d) 114, appeal dismissed mem., 284 N.Y. 767, 31 N.E. (2d) 514 (1940); Fales v. Musicians' Protective Union, 40 R.I. 34, 99 A. 823 (1917).

61 Gaestel v. Brotherhood of Painters, 120 N.J. Eq. 358, 185 A. 36 (1936); Coleman v. O'Leary, 58 N.Y.S. (2d) 812 (1945) (alternative holding), appeal dismissed as moot mem., 269 App. Div. 972, 58 N.Y.S. (2d) 358 (1945). Cf. Cohen v. Rosenburg, 262 App. Div. 274, 27 N.Y.S. (2d) 834 (1941), affd. per curiam, 287 N.Y. 800, 40 N.E. (2d) 1018 (1942).

the union officers, who are likely to be behind the prosecutors, are usually more skilled than ordinary members in the rules of procedure, turning a trial over to professional advocates would entail disproportionate loss in self-government.

The common law grew more slowly in picking out the line between permissible grounds of expulsion and grounds which are inadequate despite the authority in the constitution or by-laws. A member may be expelled for strike-breaking,[62] for working at wages below the union scale,[63] or for aiding an employer to obtain an injunction against a strike.[64] But a member of a licensing board cannot be lawfully expelled by his union because his officials displease it,[65] nor may a union expel a member for testifying against it under oath in an arbitration proceeding.[66] The familiar provision in union constitutions which states that bringing suit against the union is cause for expulsion is plainly invalid.[67] There is a nice factual line to be drawn between legitimate criticism, which as an exercise of the privilege of free speech will not justify expulsion, and stirring up dissension within the union, which is a justification.[68] The most difficult issues involve the right of a union to control its members' activities in fields outside the sphere of collective bargaining but vitally important to the welfare of its members.[69]

The LMRDA deals with union membership haphazardly. Section 101 (a) (5) incorporates into the federal statute the existing common law prohibiting the suspension or discipline of a union member except for nonpayment of dues "unless such member has

62 Becker v. Calnan, 313 Mass. 625, 48 N.E. (2d) 668 (1943); Havens v. King, 221 App. Div. 475, 224 N.Y.S. 193 (1927), affd. per curiam sub nom. Havens v. Dodge, 250 N.Y. 617, 166 N.E. 346 (1929).

63 Cf. O'Keefe v. Local 463, United Assn. of Plumbers, 277 N.Y. 300, 14 N.E. (2d) 77 (1938); Schmidt v. Rosenburg, 49 N.Y.S. (2d) 364 (1944), affd. mem. 269 App. Div. 685, 54 N.Y.S. (2d) 379 (1945).

64 Burke v. Monumental Div., No. 52, Brotherhood of Locomotive Engineers, (D.C. Md. 1922) 286 F. 949, affd. per curiam, (4th Cir. 1924) 298 F. 1019, revd. per curiam on other grounds, 270 U.S. 629 (1926).

65 Schneider v. Local 60, United Assn. Journeymen Plumbers, 116 La. 270, 40 S. 700 (1905).

66 Cf. Angrisani v. Stearn, 167 Misc. 731, 3 N.Y.S. (2d) 701 (1938), affd. mem. 255 App. Div. 975, 8 N.Y.S. (2d) 997 (1938); Thompson v. Grand Intl. Brotherhood of Locomotive Engineers, 41 Tex. Civ. App. 176, 91 S.W. 834 (1905); Link-Belt Speeder Corp., 2 Lab. Arb. Rep. 338 (1945).

67 Burke v. Monumental Div., No. 52 Brotherhood of Locomotive Engineers, (D.C. Md. 1919) 273 F. 707. See Trailmobile Co. v. Whirls, 331 U.S. 40 at 69 (1947) (Jackson, J., dissenting).

68 See Summers, "Legal Limitations on Union Discipline," 64 HARV. L. REV. 1049 at 1069-1071, 1074 (1951).

69 See COX, LAW AND THE NATIONAL LABOR POLICY 106-111 (1960).

been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing." Section 101 (a) (4) probably forbids discipline for bringing suit against a union.[70] Section 609 forbids punishing a member "for exercising any right to which he is entitled under the provisions of this Act."

No useful purpose is served by these provisions, unless it is to publicize the availability of remedies. Section 101 (a) (5) merely incorporates the common-law test of a fair hearing. No additional substantive law was required, and none was created. The need was for a more practical remedy than suit by an individual employee. Congress failed to provide one. Since the federal provisions do not exclude state law,[71] their principal consequence will be to increase litigation in the federal courts. Violations of the federal statute are actionable in the district courts of the United States.[72] In all other cases improper discipline will give rise to a state cause of action, precisely as in the past. There is no merit to the argument that the federal right is exclusive.[73] One telling criticism of the McClellan bill of rights was that its haphazard guarantee of some rights would disturb the more complete safeguards under state judicial decisions.[74] The saving clause preserving all the "rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal"[75] was inserted to meet this criticism. The obvious intent is to allow the members to enjoy the benefit of the most favorable rule.

In some situations the member may be in a position to allege facts giving rise to both federal and state causes of action. Both could be entertained by a state court. The jurisdictional problem is more difficult if the action is brought in the federal court, especially if the federal cause of action fails, for it might be argued in the absence of diversity of citizenship that the federal court lacks power to adjudicate the state cause of action. Probably the doctrine of pendent jurisdiction would save the plaintiff's case. The two causes of action are bound to be closely related. Much the same proof would be material under both. The relief sought would nearly always be the same.[76]

70 See pp. 839-841 infra.
71 Section 103.
72 Section 102.
73 But see Hickey, "The Bill of Rights of Union Members," 48 GEO. L.J. 226 (1959).
74 105 CONG. REC. 5816-5822 (April 22, 1959).
75 Section 103.
76 For a discussion of pendent jurisdiction, see HART AND WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 797-809 (1953).

Right To Sue. At common law the rights of individual members can be enforced only by individual suits; the initiative and costs necessary for prosecution must come from the member. The LMRDA preserves this condition except that the election and trusteeship titles are enforceable by the Secretary of Labor upon the complaint of a member.[77] Section 101 (a) (4) grants additional protection for this right, but its meaning is obscure because the draftsman also failed to distinguish two radically different kinds of limitations upon a union member's freedom to sue the organization.

One limitation is the familiar provision in union constitutions which declares that bringing suit against the union is cause for expulsion unless the member has exhausted his internal remedies.[78] This restriction is against public policy. No private organization should be permitted to restrict any person's access to courts of justice. The right should be as absolute as the right to appear in court as a witness, to petition on a legislature, or to communicate with a member of Congress.

A quite different kind of limitation is imposed by the judicial doctrine that a court will not entertain a member's action against a labor organization until he has exhausted all adequate remedies within the organization. The rule is one of judicial administration. It applies not only to suits involving the internal affairs of all forms of voluntary association,[79] but also to actions upon ordinary contracts, including collective bargaining agreements.[80] In an exaggerated form the exhaustion-of-remedies doctrine may deny legal relief to a plaintiff whose internal remedy is vain, too slow or too expensive, but when wisely administered, the doctrine strengthens the independence and self-government of private associations. Courts and administrative agencies should not interfere in the internal affairs of labor organizations, if union democracy is our goal, until the organization has had a reasonable opportunity to correct any mistakes of subordinate bodies.

It is not clear whether section 101 (a) (4) affects both limitations upon suits by union members, or only the first, leaving the courts free to apply the exhaustion-of-remedies doctrine wherever appropriate. The sponsors of the bill of rights and other amend-

77 Sections 304 and 402.

78 E.g., Constitution of International Union of United Mine Workers of America, effective November 1, 1948, art. IX.

79 7 C.J.S., Associations §34 (b) (1937).

80 The labor cases are collected in Cox, "Rights Under a Labor Agreement," 69 HARV. L. REV. 601 at 647-649 (1956).

ments adopted on the floor of the Senate were much less concerned with encouraging democratic self-government than the supporters of the original Kennedy bills. Some of the conferees were not sympathetic to the exhaustion-of-remedies doctrine. The proviso permitting a union to require a man to exhaust internal remedies available within four months is more appropriately linked with the judicial doctrine than with restrictions imposed by the union itself. There are, however, a number of persuasive reasons for concluding that section 101 (a) (4) should not be construed to interfere with the exhaustion-of-remedies rule.

(a) The words of section 101 (a) (4) literally refer only to limitations imposed *by a labor union,* not to judicial rules of decision. "No *labor organization shall limit* the right of any member thereof to institute an action in any court. . . ."[81] The full text confirms the literal reading. It obviously refers to union rules and union discipline interfering with the rights to testify and petition the legislature. The guaranty of the right to sue is expressed in the same terms.

(b) The exhaustion-of-remedies doctrine applies in the state courts no less than federal forums. Section 101 (a) (4) also applies to state proceedings no less than federal, whatever may be the proper interpretation. It seems unlikely that Congress would so lightly sweep aside state rules of judicial administration.

(c) The broad interpretation would give section 101 (a) (4) a curious backlash. If it regulates the legal proceedings brought by individual members by abolishing the exhaustion-of-remedies doctrine whenever the delay would exceed four months, must it not also regulate such proceedings by allowing unions to require the exhaustion of any remedies which consume less than four months? If so, a labor union may now require a member to resort to proceedings within the union before filing charges under the NLRA. There was no such doctrine in the past.

(d) Reading section 101 (a) (4) to interfere with judicial and administrative rules of decision creates still other perplexities. It applies to all suits by union members regardless of the identity of the defendant. Does it therefore overturn the rule that an employee may not sue an employer to enforce a collective bargaining agreement until he has exhausted the grievance procedure? Some labor contracts stipulate that no individual employee shall be

81 Emphasis supplied.

entitled to any right or remedy outside the grievance procedure. In other cases unions negotiate adjustments intended to bind the grievants. To extend section 101 (a) (4) into these areas would greatly interfere with collective bargaining in ways which Congress never considered.[82] Under the narrower interpretation the damage would not be done, but the provision would still serve a useful and necessary purpose as a guarantee against restrictions imposed by union rules.

The legislative history gives little guidance. Senator Kennedy's exposition of the Conference Report just before the Senate vote espoused the narrower interpretation,[83] but some of the House conferees undoubtedly hoped that the broader construction would prevail. The ambiguity is traceable partly to this difference of opinion but primarily to the hasty manner in which the compromise bill of rights was prepared.

Admission to Union Membership. The most glaring defect in the common-law rights of employees *vis-à-vis* their representative for the purpose of collective bargaining was the want of legal remedies for unfair or discriminatory denials of membership. It is a black-letter rule that no one has a legally-protected right to become a member of a voluntary association.[84] Consequently, a union may exclude an applicant for any reason, good or bad, or for no reason. It may even discriminate upon grounds of race, color, sex or religion.

Until recently there was reason to hope that the courts might gradually change the rule applicable to labor unions. Its repetition gives it a stronger ring of authority than the direct precedents warrant. Union membership rarely involves the close personal association which must have influenced the courts in their refusal to compel social clubs to admit unwanted members, nor does eligibility turn upon the theological niceties pertinent to religious organizations. Unions exercise powers under the National Labor Relations and Railway Labor Acts which are greater than the power of other voluntary associations — much greater indeed than the powers which unions exercised prior to the legislation. Since

82 Powell, "The Bill of Rights—Its Impact Upon Employers," 48 GEO. L.J. 270 at 271-273 (1959). For a more general discussion, see Cox, "Rights Under a Labor Agreement," 69 HARV. L. REV. 601 (1956).

83 105 CONG. REC. 16414 (Sept. 4, 1959).

84 87 C.J.S., Trade Unions §33 (1954). But the modern view denies a union the privilege of enforcing closed-shop contracts against those to whom it has arbitrarily denied admission. See James v. Marinship Corp., 25 Cal. (2d) 721, 155 P. (2d) 329 (1944).

union membership is correspondingly more important, this factor was ample ground for distinguishing the earlier cases and recognizing a legally-protected interest in a fair opportunity to become a member of the union which acts as the bargaining representative of the unit in which the applicant is employed.[85] It was also possible to argue that performance of the representative's duty of fair representation requires admitting all members of the bargaining unit to union membership, in the absence of proper cause for exclusion, because membership is the best assurance that the employee's voice will be heard and his interests be represented. Unfortunately, the decision in *Ross v. Ebert*,[86] and the Supreme Court's refusal to review the *Oliphant* case[87] have discouraged, if not permanently foreclosed, this avenue of progress.

The LMRDA "bill of rights" does nothing to correct the evil. The prospect for new federal legislation is also dim. Unions oppose giving legal remedies for the unfair or discriminatory denial of membership partly because of a belief that absolute freedom to select members is the right of a voluntary association and partly upon the practical ground that forced integration would prevent the unionization of southern workers. Congressmen from the southern states oppose such legislation as part of the battle over segregation.

As a practical matter, therefore, protection of the public interest in affording employees an opportunity to participate in the affairs of the unions which represent them rests in the hands of the labor movement. If the AFL-CIO would take stronger measures to press its affiliates to conform to its constitutional provisions against discrimination,[88] it might well find that the gains from a revival of conscience offset any immediate practical loss.

B. *Union Elections*

The election of officers is the heart of union democracy. The policies of any large organization must be formulated and administered by a small group of officials. Their responsiveness to the members depends upon the frequency of elections, a fair oppor-

85 Cf. Dusing v. Nuzzo, 177 Misc. 35 at 37, 29 N.Y.S. (2d) 882 (1941), modified 263 App. Div. 59, 31 N.Y.S. (2d) 849 (1941); Raevsky v. Upholsterers' Intl. Union, 38 Pa. D. & C. 187 at 195 (1940).

86 275 Wis. 523, 82 N.W. (2d) 315 (1957).

87 Oliphant v. Brotherhood of Locomotive Firemen, (N.D. Ohio 1957) 156 F. Supp. 89, cert. den. 355 U.S. 893 (1957), affd. (6th Cir. 1958) 262 F. (2d) 359, cert. den. 359 U.S. 935 (1959).

88 AFL-CIO CONST., ART. II, §4.

tunity to nominate and vote for candidates, and an honest count of the ballots.

Commentators are in disagreement as to the capacity of the common law to police the electoral process in labor organizations.[89] A court can undoubtedly grant effective relief against violations of a union's own constitutions and by-laws, except where foreclosed by doctrinal rulings requiring the violation of a property right, but it would be hard for the court to supervise elections and virtually impossible to supply the minimum electoral guarantees if they were missing from the union's constitution.

The LMRDA establishes comprehensive requirements for the conduct of union elections. Local officers must be elected every three years or oftener by secret ballot of the members or by a convention chosen by secret ballot.[90] International officers must be elected every five years or oftener by a secret ballot of the members or by a convention of delegates chosen by secret ballot.[91] Officers of bodies intermediate between the local and the international must be elected not less often than every four years but the choice may be made by other union officers.[92] Probably the election provisions are inapplicable to bodies made up of representatives from several different unions not affiliated with the same international union — the building and construction trades councils, for example. These organizations, although they engage in collective bargaining, are neither international unions nor local unions, which were the terms of art used in the Kennedy bills.[93] The word "organization" was later substituted for "union" throughout the bill as part of a purely formal change of phraseology. The regulations issued by the Secretary of Labor are silent upon the question.

The LMRDA also guarantees the right to nominate and support candidates, to run for office, to get written notice of the election, and to vote without "improper interference or reprisal of any kind."[94] Every member is guaranteed one vote, a provision which not only invalidates the practice of limiting the vote to a special class of members but which also assures apprentices and even employers a voice in the selection of the officers of any labor organiza-

89 Compare Wellington, "Union Democracy and Fair Representation," 67 YALE L.J. 1327 at 1347-1349 (1958), with Cox, "The Role of Law in Preserving Union Democracy," 72 HARV. L. REV. 609 at 624-629 (1959).

90 Section 401 (b).

91 Section 401 (a).

92 Section 401 (d).

93 S. 505, 86th Cong., 1st sess., §301 (1959).

94 Section 401 (e).

tion to which they may belong.[95] The statute attempts to preserve the integrity of the election by giving each candidate the right to have an observer at the polls and the counting of the ballots. In international elections the results of the balloting must be published separately for each local union.[96] The division of sentiment in a single local is usually well enough known to its members to reveal any serious dishonesty in counting the ballots provided that the figures are not concealed by lumping them into a single total with the results in other local unions. Compliance with the union's constitution and by-laws is made a statutory obligation in order that the federal remedy may be available for violations.[97]

To prevent union officials from gaining improper advantage, section 401 (e) requires a union to distribute any candidate's campaign literature to the members at his own expense, and to refrain from discrimination between candidates in making other facilities available. Section 401 (g) prohibits using union funds to promote the candidacy of any person. The administration of the latter provision will require delicate judgments. When a union president visits major locals on union business during the months before an election, he is not unmindful of his political fences. The international representative who goes to another city to handle grievances may be expected to discuss an impending election. The incumbents invariably command more space in the union newspaper than the opposition. Legislation can no more wipe out these advantages than it can prevent a President's dramatic move toward world peace from aiding his campaign for reelection. The statute obviously forbids such grossly unfair tactics as hiring additional organizers to campaign for the reelection of incumbent officials or using the union treasury to send out election propaganda.

The demand that all candidates be given access to the union's membership lists produced sharp debate in Congress because two irreconcilable principles were at stake. Since a candidate seeking to defeat the incumbents would be hampered by the lack of a voting list, access to membership lists became a symbol of truly democratic elections in the eyes of those congressmen who would not count it a loss if labor unions were damaged in the process. On the other hand, the unions attach great importance to the secrecy of their membership lists because employers, rival unions and subversive organizations have often sought to obtain lists for improper

[95] See pp. 833-834 supra.
[96] Section 401 (e).
[97] Section 401 (e) and (f).

purposes. Under present conditions the need for secrecy is probably exaggerated, but one friendly to the labor movement could hardly ignore the strength of the tradition or the force of experience even though he was also driven to acknowledge that the preservation of secrecy diminished the fairness of the election. In the end a compromise was reached which gives a candidate the right to inspect a list of members who are employed under union security contracts, once within thirty days of the election and without copying the lists. This limited privilege can hardly be abused.[98]

Enforcement of the election requirements is vested in the Secretary of Labor. A member desiring to challenge an election must first invoke his remedies within the organization. After they are exhausted or if three months elapse without a decision, he may file a complaint with the Secretary who, upon investigation, will either dismiss the complaint or file an action in the federal court to set aside the election. The complaint is to be upheld only if it appears that the violation of the statute "may have affected the outcome of an election."[99] It would be wasteful to set aside an election for violations which could not have affected the result but obviously proof that the outcome would have been different is not required. If an election is set aside, the Secretary is to conduct a new election.[100] An appeal may be taken from a court order directing an election, but in the interests of expedition there may be no stay pending the appeal.[101] In order to preserve continuity in the management of union affairs and discourage "strike suits" the statute creates a presumption of the validity of an election until a final judicial decision.

The foregoing provisions seem adequate to guarantee free and fair union elections. They descend too far into detail, impairing the ideal of self-government, but there is no requirement which can seriously hamper a union's normal functioning. Only the requirement of individual notice of elections on stated occasions can be criticized as expensive,[102] and the cost is certainly no more than ten cents a member for each election.

Section 403 provides careful and apparently sound rules concerning the relation between state and federal law. State regulation of union elections is barred in the interest of uniformity.

98 Section 401 (c).
99 Section 402 (c).
100 Ibid.
101 Section 402 (d).
102 Section 401 (e).

International and national unions operate in many states. It would be confusing, unduly burdensome, and often impossible for them to comply with a variety of election laws. No corporation is subject to such burdens in the election of its officers. The same considerations apply with lesser force to local unions. A considerable number function in several states. The burden of checking compliance is likely to fall upon the international union. It is also easier to enforce one uniform rule than a crazy-quilt of state legislation. Finally, ill-considered state laws would interfere with the national labor policy. Too stringent laws would handicap unions in dealing with employers. Too frequent elections might result in union instability. A comparatively stable leadership can devote itself to constructive action thereby serving both employees and the public.

Since these considerations do not apply to a suit to enforce a union's own constitution or by-laws, section 403 preserves state remedies prior to an election. A proceeding to challenge an election already conducted should bind all interested persons; consequently the statutory remedy is made exclusive.

C. *International Trusteeships*

The constitutions of many international unions authorize the international officers to suspend the normal government of a constituent local union, assume control of its property, and conduct its affairs. The guiding standard is usually vague. For example, the constitution of the Hotel and Restaurant Employees provides that the General President may appoint a trustee if he "decides that any of the officers of a local union are dishonest or grossly incompetent or that the organization is not being conducted for the best interests of the Local and International."[103]

It needs no argument to demonstrate that placing a local union in trusteeship involves serious impairment of both liberty and self-government. Thereafter all decisions affecting the local are made by officials appointed by the international. The local officers are suspended. There are no new local elections. The members can hold no meetings unless the trustee approves. Often the members lose even the power to choose delegates to international conventions, thus becoming unable to influence the policies of the international or the conduct of its affairs. It seems probable, moreover, that the threat of imposing a trusteeship is often an effective way

[103] Mixed Local of Hotel Employees v. Hotel Employees, 212 Minn. 587 at 590, n. 2, 4 N.W. (2d) 771 (1942).

to compel a local union to conform to instructions of the international officers which are contrary to the desires of the members.

Nevertheless, any thoughtful discussion of union trusteeships must recognize their indispensability. Trusteeships are one device, perhaps the primary device, by which international officers can keep the labor movement strong and effective, untainted by corruption, and free from subversion. In his testimony before a Senate subcommittee AFL-CIO President Meany noted that a trusteeship may be necessary to bring about the honest administration of local-union funds, or to restore freedom and democracy within a local union. "[O]ccasionally a local union officer or business agent secures complete control over the local, and becomes a virtual dictator. He may fail to call membership meetings, hold no elections, and simply run the union to suit himself."[104] Third, Mr. Meany said that a trusteeship may be a means to free a subordinate body from racketeers or Communist control.[105]

Two other situations might be added to this list. One is that occasionally local officers act irresponsibly in collective bargaining or lose control over the members. The calling of unauthorized strikes in violation of the international's constitution or the inability or unwillingness to honor collective-bargaining commitments is a proper cause for international intervention.[106] Second, if a union becomes so torn by dissent that its business is paralyzed, or if its local officers and members become too lazy to service existing contracts or organize non-union firms, the suspension of local autonomy may be the only way to rebuild an effective local organization.

Unfortunately trusteeships have also been a virulent source of political autocracy and financial corruption. Some of the most notorious are familiar to every student of labor history. It seems reasonable to infer from several reported cases that thousands of dollars were extracted from laborers and contractors in the building of the Delaware River Aqueduct through the activities of Bove, Nuzzo, and their associates, with the connivance, if not support, of the international officers of the Hod Carriers Union.[107]

104 Hearings on Union Financial and Administrative Practices and Procedures Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 85th Cong., 2d sess., 64 (1958).

105 Ibid.

106 Cromwell v. Morrin, 91 N.Y.S. (2d) 176 (1949).

107 See Canfield v. Moreschi, 268 App. Div. 64, 48 N.Y.S. (2d) 668 (1944), affd. 294 N.Y. 632, 64 N.E. (2d) 177 (1945); Moore v. Moreschi, 179 Misc. 475, 39 N.Y.S. (2d) 208 (1942), affd. 265 App. Div. 989, 40 N.Y.S. (2d) 334, modified 291 N.Y. 81, 50 N.E. (2d) 552 (1943); Dusing v. Nuzzo, 177 Misc. 35, 29 N.Y.S. (2d) 882 (1941), modified 263 App. Div. 59, 31 N.Y.S. (2d) 849 (1941).

The autocratic direction of the United Mine Workers results at least in part from the suspension of local self-government. Twelve local unions of the International Union of Operating Engineers, representing about twenty percent of the membership, were held under international supervision; seven were held in trusteeship for at least ten years and two for twenty-nine years.[108] The McClellan Committee also found that thirteen percent of all the locals in the International Brotherhood of Teamsters were under trusteeships; some of them were taken over more than fifteen years ago.[109] No one should suppose that these faults were characteristic of the labor movement but they were nevertheless cause for great public concern.

There appear to have been four chief motivations for the imposition of improper trusteeships.

(1) The opportunity to loot rich local treasuries has been a significant temptation.[110]

(2) The desire to control the policies of a local union may stem from honorable motives but in a good many cases there has been evidence of a desire to use union position for personal advantage.[111]

(3) Other trusteeships have been imposed in order to keep in office men friendly to the international union.[112]

(4) The imposition of a trusteeship may be a method of controlling an international convention. Frequently the trustee appointed the delegates of the local union under his control. Since the General President would name a trustee friendly to himself, the trustee could be expected to follow the president's suggestions in choosing delegates, and the delegates themselves would not be blind to their dependence upon the president's good will. With ten or twenty percent of the membership in trusteeships the international officers had a strong bloc of votes.

There is little indication that the courts afford local-union members adequate protection against abuse of the trusteeship de-

108 S. Rep. 1417, 85th Cong., 2d sess., 371 (1958).

109 Id. at 448.

110 See cases cited note 107 supra.

111 This statement is based upon a number of trusteeships described in the McClellan Committee hearings. S. Rep. 1417, 85th Cong., 2d sess., 447, *passim* (1958).

112 For example it is reported that when the Teamster's Local in Pontiac, Michigan revolted against domination by four officials accused of extortion, the International named Hoffa as trustee and he reappointed two as business agents.

vice. The courts are governed chiefly by implications of the doctrine that the constitution and by-laws of a voluntary association are a contract between the association and the members. Trustees designated by an international union will be enjoined from interfering with the property of a local if the international officers failed to follow constitutional procedures.[113] Furthermore the rule seems to be settled, again by analogy to cases dealing with the discipline of individual members, that receivers may not be appointed to take over a local unless there is a fair hearing including notice of the charges and an opportunity to present a defense.[114] Not only are there very few reported decisions staying or upsetting trusteeships upon substantive grounds but there is also pragmatic evidence of the inability of the common law to grant local-union members adequate protection against unjust trusteeships. For example, Hoffa was recently trustee of seventeen different locals.[115] Some Teamsters locals have been under trusteeship for fifteen years.[116] Perhaps such facts evidence only an indifference to self-government so long as the union officialdom proves reasonably efficient in securing higher wages for the members, but it seems more likely that the explanation lies in the practical impediments to utilizing what little theoretical protection the common law affords. The cost of legal proceedings is likely to be heavy. Even if the suit is successful, the individual members will reap no monetary advantage. Occasionally a group of members may feel strongly enough to institute an action in order to protect what they feel are intangible rights, but most men would not regard this as a sufficient inducement for risking financial loss. The individual member who institutes an action against international officers runs considerable risk of reprisal and the more arbitrary the imposition of the trusteeship the greater are the risks imposed.

The LMRDA remedies most of these defects. Section 301 requires periodic reports to the Secretary of Labor concerning an international trusteeship. Section 302 establishes two standards for testing the legality of a trusteeship.

113 Canfield v. Moreschi, 268 App. Div. 64, 48 N.Y.S. (2d) 668 (1944), affd. 294 N.Y. 632, 64 N.E. (2d) 177 (1945).

114 See Local 373, Intl. Assn. of Bridge Ironworkers v. Intl. Assn. of Bridge Ironworkers, 120 N.J. Eq. 220 at 230, 184 A. 531 (1936); Neal v. Hutcheson, 160 N.Y.S. 1007 at 1010 (1916).

115 S. Rep. 1417, 85th Cong., 2d sess., 448 (1958).

116 Ibid.

(1) The trusteeship must conform to the constitution and by-laws of the labor organization.

(2) It may be imposed only for the purpose of "correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, . . . or otherwise carrying out the legitimate objects [of the international union] . . . ."

These standards are somewhat general, especially the last, but this is an area in which it is very difficult to find abstract criteria by which to separate measures essential to strong internal government from subterfuges which are oppressive or corrupt. On the other hand, these standards should not be difficult to follow in any particular case after the facts are developed — certainly no more difficult than to decide what is an unreasonable restraint of trade or an unfair method of competition.

Section 304 attempts to supply a guideline for determining whether a receivership meets the statutory standard. Recognizing the delicate judgments which international officers are called upon to make in imposing a trusteeship and conscious of the relative inexpertness of outsiders, it provides that for the first eighteen months a trusteeship "shall be presumed valid . . . and shall not be subject to attack . . . except upon proof that the trusteeship was not established in good faith for a purpose allowable under section 301."[117]

The burden of showing lack of good faith is heavy, yet the possibility permits the invalidation of those receiverships which are shown to be only a subterfuge for an improper purpose. The presumption is available, however, only if the trusteeship is instituted in procedural conformity with the constitution and by-laws of the international labor organization and "authorized or ratified by its executive board after a fair hearing." The language adopts the view that the rush of events may force the international president to act without a hearing and therefore permits him to hold the hearing after the trustee has been appointed. The desire to gain the benefit of the presumption should be enough to induce a union to allow a hearing at least after the trustee's appointment.[118]

[117] S. 3454, 85th Cong., 2d sess., §203 (c) (1958).

[118] The provision for ratification is included because a General President must sometimes move rapidly in order to halt financial mismanagement or corruption.

The obnoxious element in trusteeships is their duration. The initial suspension of local self-government is usually justified by the needs of the organization, and it would unreasonably impair the independence of the labor movement to allow much scope at this point for the government to review the judgment of union officials as to the needs of the organization or the best means of effectuating them. On the other hand, the local emergency which justifies international intervention can normally be resolved in a relatively short period of time. There was some temptation, therefore, to fix a rigid statutory limit on the duration of trusteeships. Upon more careful analysis the dangers of any arbitrary time limit seemed clear. If Communists capture a local union, it may be more than eighteen months before the international officers can build up a group of loyal trade unionists able and willing to govern their own affairs despite skilled subversion. Unhappily the entire leadership of a local may be corrupt and its ouster may leave a vacuum which is not easily filled. Some flexibility is therefore required.

The LMRDA attempts to solve this problem by reversing the presumption which applies during the first eighteen months. Section 304(c) provides that "[a]fter the expiration of eighteen months the trusteeship shall be presumed invalid unless the labor organization [concerned] shall show by clear and convincing proof that the continuation of the trusteeship is necessary for a purpose allowable under section 302." If a trusteeship is needed for more than eighteen months, surely the international officers ought to be able to demonstrate the reason.

The new law also deals with two specific abuses often incident to trusteeships. Section 303 makes it a crime to transfer to the international union any funds of the local except the normal per capita tax and assessments payable by subordinate bodies not in trusteeship. This provision prevents the appointment of trustees for the purpose of "milking" a local treasury. The same section makes it unlawful to count votes of convention delegates designated to represent a local union held in receivership unless the delegates were elected by secret ballot in a general vote of the membership. This provision prevents the use of trusteeships to control the choice of delegates to an international convention.

IV. CONCLUSION

The ultimate impact of the LMRDA cannot be foretold. As with any new legislation experience may well demonstrate that revisions are required. The legislation contains more than its share of problems for judicial interpretation because much of the bill was written on the floor of the Senate or House of Representatives and because many sections contain calculated ambiguities or political compromises essential to secure a majority. Consequently, in resolving them the courts would be well advised to seek out the underlying rationale without placing great emphasis upon close construction of the words.

The new statute makes a number of contributions to the long-range development of labor law.

(1) The act is the first major step in the regulation of the internal affairs of labor unions. It expands the national labor policy into the area of relations between the employees and the labor union. Previously national policy was confined to relationships between management and union.

(2) The enactment of a federal statute dealing with the internal affairs of labor organizations commits us to the national development of all aspects of labor policy. The LMRDA reaches even farther out from interstate transportation of goods than the NLRA, although it would seem plain that there is power under the commerce clause to prevent collective bargaining representatives designated under the RLA and NLRA from abusing their authority. If the federal government had not moved into this field, state legislation might have been enacted. The passage of federal legislation relieved the pressure; it also makes further state action unlikely. This is a vast expansion of federal responsibility.

(3) The effectiveness of the new law will depend largely upon the initiative and energy of union members. Apart from the election and receivership provisions, which can be enforced by the Secretary of Labor upon receipt of a complaint from an individual member, the LMRDA relies primarily upon individual employees to enforce the duties of union officials by intelligent voting or private suits.

Many conscientious labor leaders and their legal advisers fear that the act will result in a rash of burdensome litigation, some financed by employers despite the statutory prohibition, which

will waste the unions' resources and hamper their normal activities. On the other hand, there is the danger, often expressed in the past, that individual employee's suits are neither an effective sanction nor a practical remedy. Workers are unfamiliar with the law and hesitate to become involved in legal proceedings. The cost is likely to be heavy, and they have little money with which to post bonds, pay lawyer's fees and print voluminous records. Time is always on the side of the defendant. Even if the suit is successful, there are relatively few situations in which the plaintiff or his attorney can reap financial advantage. Most men are reluctant to incur financial cost in order to vindicate intangible rights. Individual workers who sue union officers run enormous risks, for there are many ways, legal as well as illegal, by which entrenched officials can "take care of" recalcitrant members.

Only time can resolve the uncertainty. Although the LMRDA creates few rights of action which did not exist at common law, their codification in highly-publicized legislation will bring them to the attention of union members and their lawyers and, for a time at least, will both facilitate the litigation and reduce the fear of reprisals. Judges can be expected to respond to public and congressional opinion. Nevertheless, experience suggests that in the long run the volume of litigation is to be quite small. Only two reported decisions involve suits for an accounting for alleged breach of an agent's fiduciary obligations. Despite all the publicity, the large sums at stake and the evidence developed by the McClellan Committee, there have been few actions against the Becks, Hoffas, Brewsters and Webers. A hundred-fold increase in the volume of litigation would not harm the labor movement. One of the proper costs of coming-of-age is the risk of unjustified litigation; the risk of unwarranted suits is the price we pay for assurance that every man will have his day in court.

In conclusion, we should recognize that the law cannot compel idealism or create the spirit of self-government. It cannot force union members to attend meetings or hold their officers to a strict accounting. Many of the intellectuals who grew up under the New Deal may have allowed a romantic glow which surrounded the unionism of the 1930's to obscure harsher facts, but I cannot believe that they were entirely wrong in sensing a vitality which had something quite different to offer than wealth and power for union officials and more and more monetary benefits for union members.

The prestige of labor unions is at a low ebb today partly because of the tremendous propaganda advantages gained by hostile forces as a result of the cynical wrongdoing of a few union leaders. But it is also attributable to their obscuring the basic idealism within the labor movement.